No. 93-1182

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1993

RODERICK L. CUTRIGHT,

Petitioner,

v.

E. R. CARPENTER COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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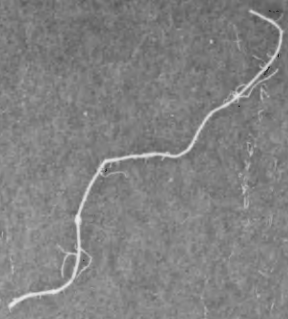

QUESTIONS PRESENTED

A. WHETHER A CLAIM FOR BACK PAY FROM A FORMER EMPLOYER ENTITLES A PLAINTIFF UNDER THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT OF 1974 TO A JURY TRIAL.

B. WHETHER THE LACK OF A JURY WAS HARMLESS ERROR.

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RULE 29.1 STATEMENT

Respondent E. R. Carpenter Company, Inc. is a corporation with no publicly-held parents, subsidiaries or corporate affiliates that have any financial interest in the outcome of this case.

TABLE OF AUTHORITIES

CASES

Curtis v. Loether, 415 U.S. 189 (1974) 4, 7, 8

Freeman Contractors v. Central Sur. & Ins. Corp., 205 F.2d 607 (8th Cir. 1953) 12

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Teamsters Local 391 v. Terry, 494 U.S. 558 (1990) . . . 4, 6-9, 13

Troy v. City of Hampton, 756 F.2d 1000 (4th Cir.), cert. denied, 474 U.S. 864 (1985) 8, 9, 11

Wooddell v. IBEW Local 71, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991) 8

STATUTES

Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4301 et seq., Public Law No. 93-508, § 404(a) 1, 11

OTHER AUTHORITY

S.Rep. No. 907, 93d Cong., 2nd Sess. 111 (1974), reprinted in 120 Cong.Rec. 2022 (1974) 11

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STATEMENT OF THE CASE

A. Summary of Procedural History

Petitioner Roderick L. Cutright ("Cutright") sued in the United States District Court for the Eastern District of Virginia, alleging that his employer, E. R. Carpenter Company, Inc. ("Carpenter"), terminated his employment in violation of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("Veterans' Act"), 38 U.S.C. § 4301 et seq. He sought back pay and benefits from Carpenter, based on his discharge. Petition, p. 9.

The trial court granted Carpenter's Motion to Strike Plaintiff's Demand for a Jury Trial. At trial, the Court found that Carpenter had discharged Cutright for legitimate business reasons unrelated to his military reserve status. Appendix A: 4.

Cutright appealed to the United States Court of Appeals for the Fourth Circuit on two grounds, one of which was his claim that the District Court improperly struck the

jury demand. The Fourth Circuit affirmed by unpublished *per curiam* opinion. Cutright now seeks certiorari on the issue of whether he was entitled to a jury trial on his claims under the Veterans' Act.

B. Statement of the Relevant Facts

Carpenter hired Cutright in 1988 to perform plant engineering tasks at its manufacturing facility. When he was hired and throughout his employment, Cutright was also an officer in the United States Army Reserve.

Although Cutright claims in his brief, without citation to the record, that "Carpenter refused to allow its Plant Engineer to miss days of work during work weeks because of this Reserve duty. . . ." (Petition p. 8), that was not an issue at trial. Instead, the issue was whether he was discharged because of his reserve status. Appendix A: 4. There was ample evidence at trial that his managers were dissatisfied with his job performance. The trial court found

that "Carpenter discharged Cutright for legitimate business reasons unrelated to his military reserve status." Appendix A: 4. Petitioner has not appealed this aspect of the Court's ruling.

SUMMARY OF THE ARGUMENT

Supreme Court Rule 10.1 provides for a writ of certiorari "only when there are special and important reasons therefor." No such reasons exist in this case. Although petitioner suggests that there might be a split in the circuits or that this Court needs to resolve the issue of whether back pay from an employer constitutes a legal rather than a restitutionary remedy, neither is true.

First, this Court has already addressed the issue in Teamsters Local 391 v. Terry, 494 U.S. 558, 572 (1990), and, citing its earlier decision in Curtis v. Loether, 415 U.S. 189 (1974), reiterated "that back pay sought from an employer under Title VII would generally be restitutionary in nature . . . ." Here, petitioner seeks back pay from his employer and, under this Court's Terry analysis, that would constitute equitable relief not warranting a jury trial.

As for the alleged conflict between the Third and Fourth Circuits, there is none. The only case petitioner cites

is a 20 year old Third Circuit case, Gruca v. U.S. Steel Corp., 495 F.2d 1252 (3d Cir. 1974), which did not even mention the right to a jury trial and has been superseded by amendments to the Veterans' Act clarifying its equitable nature. Gruca, therefore, does not present a current conflict either with the Fourth Circuit or this Court's ruling almost 15 years later in Terry.

Finally, the lack of a jury was harmless error. The evidence at trial would have warranted a JNOV for Carpenter even if there had been a jury, so the court's ruling did not affect the outcome of this case.

There are, therefore, no special and important reasons for this Court to review the Fourth Circuit's decision.

ARGUMENT

A. IT IS WELL SETTLED THAT PETITIONER IS NOT ENTITLED TO A JURY TRIAL UNDER THE VETERANS' ACT BECAUSE HIS ACTION AND REMEDIES ARE EQUITABLE IN NATURE.

The parties agree that the test articulated in Teamsters Local 391 v. Terry governs this issue. Oddly, petitioner cites Terry for his claim that, because the relief he sought (back pay) was monetary, it was automatically legal rather than equitable. Petition, p. 13. That is not at all what this Court held in Terry. Terry granted a jury demand under the National Labor Relations Act (a wholly different action from the Veterans' Act at issue here), but specifically refused to hold that "any award of monetary relief must necessarily be 'legal' relief." 494 U.S. at 570. Instead, this Court noted that: "[t]o determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought." Id. at 564-65.

See also, Curtis v. Loether, supra (Court applied the same test in a case brought under the Civil Rights Act of 1968).

This Court "characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'" 494 U.S. at 565, 570. The Terry plaintiffs, on the other hand, sought damages from their union representing pay they would have received from their employer if not for the union's alleged breach of duty. Id. at 562-63. The Court specifically distinguished the money sought from the union in Terry from the type of back pay sought here directly from the employer:

> The back pay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from [the employer] had the Union processed the employees' grievances properly. Such relief is not restitutionary.

Id. In contrast, petitioner here seeks money he claims was wrongfully withheld by the employer in the form of back pay. Petition, p. 9. This is purely restitutionary:

> Furthermore, the Court has noted that back pay sought from an employer under Title VII would generally be restitutionary in nature, see Curtis v. Loether, in contrast to the damages sought here from the Union. Thus, the remedy sought in this duty of fair representation case is clearly different from back pay sought for violations of Title VII.

494 U.S. at 572 (citation omitted).[1]

In Troy v. City of Hampton, 756 F.2d 1000, 1003 (4th Cir.), cert. denied, 474 U.S. 864 (1985), the Fourth Circuit correctly applied this Court's Terry analysis to conclude that back pay sought under the Veterans' Act is equitable: "claims under 38 U.S.C. § 2021 et seq. are equitable in nature and must be tried to the court."[2]

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[1]Cutright's reliance on Wooddell v. IBEW Local 71, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), is similarly misplaced. There plaintiff sought damages from his union because of alleged discriminatory referral practices. This Court held a jury trial appropriate, because the damages he sought were not restitutionary.

[2]Petitioner's use of a dissenting opinion in Troy to attempt to compare a claim under the Veterans' Act to an 18th Century common law claim of *indebitatus assumpsit*

(continued...)

Citing Terry, Troy, and the congressional intent that the Act "be governed by equitable principles," the Fourth Circuit correctly held in this case that "the equitable nature of the remedy sought by Cutright's claim also precludes a jury trial . . . ." Appendix A: 6. This involved no new

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[2](...continued)
ignores rulings by other circuit courts on 18th Century analogies to Civil Rights actions. See, e.g., Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, 111 S. Ct. 2825, 115 L.Ed.2d 995 (1991) (citation omitted) ("plaintiff's [Title VII] action is most closely analogous either to an eighteenth century tort action or an implied action brought to enforce an express or implied employment contract. Such actions could have been brought in either courts of law or courts of equity, depending on the relief sought. Therefore, this first factor is not persuasive authority either for or against a jury trial . . ."). The relative insignificance of historical analogy has led Justice Brennan to call for its deletion altogether:

> [T]his Court, in expounding the test, has repeatedly discounted the significance of the analogous form of action for deciding where the Seventh Amendment applies. I think it is time we dispense with it altogether.

Terry, 110 S. Ct. at 1350 (Brennan, J., concurring). The search for an 18th Century analogy is certainly unnecessary here in light of this Court's characterization of back pay as equitable in Terry.

rule of law. This Court should deny certiorari here for the very same reasons it did in Troy. The rules are the same. The test is the same. No "special and important reasons" justify a writ of certiorari.

B. THERE IS NO CONFLICT IN THE CIRCUITS.

Finally, petitioner, citing Gruca v. U. S. Steel Corp., 495 F.2d 1252 (3d Cir. 1974), asserts that a conflict with the Third Circuit warrants a writ of certiorari. Gruca, however, did not even mention the right to a jury trial. Instead, the Gruca court held that claims under the Act could be both legal and equitable, and applied a state statute of limitations to part of a plaintiff's claim. Eight months later, however, Congress passed the 1974 Amendments to the Veterans' Act, which clarified the Act's equitable nature:

> Included in the 1974 amendments is a provision that no state statute of limitations shall apply to any proceedings under the Act . . . . Congressional intent that proceedings be governed by equity principles clearly indicates that Congress found the rights and remedies

> established by the Act to be equitable in nature.

Troy, 756 F.2d at 1002 (citing 38 U.S.C. § 4302).[3] Gruca, therefore, has been overruled by changes to the statute, and does not conflict with the Fourth Circuit:

> The legislative history accompanying the amendments makes it clear that Congress specifically intended to overrule cases like . . . Gruca v. U.S. Steel Corp., supra, as inconsistent with the original intent of Congress.

Stevens v. Tennessee Valley Auth., 712 F.2d 1047, 1055 (6th Cir. 1983) (Citing S.Rep. No. 907, 93d Cong., 2nd Sess. 111 (1974), reprinted in 120 Cong.Rec. 2022 (1974)).

In short, the Gruca case was decided before the amendment, was overruled by the amendment, and does not present a conflict with the more recent rulings in either

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[3]Public law 93-508, § 404(a), added the statute of limitations language on December 3, 1974. Gruca was decided eight months earlier in April, 1974.

Terry or Troy. The law is clear and in conformity throughout the circuits.

C. THE ABSENCE OF A JURY WAS HARMLESS ERROR.

In determining whether the denial of a jury is a harmless error, courts should "consider the evidence in the same manner as if [the] appeal had been from a judgment on a directed verdict in a jury case." Freeman Contractors v. Central Sur. & Ins. Corp., 205 F.2d 607, 613 (8th Cir. 1953). "[I]f on the factual issues raised by the pleadings a jury verdict in favor of appellant would have to be set aside because of lack of substantial foundational evidence, any error in refusing a jury trial would constitute harmless error not justifying retrial." King v. United Ben. Fire Ins. Co., 377 F.2d 728, 731 (10th Cir.), cert. denied, 389 U.S. 857 (1967).[4] While petitioner may have disagreed with his

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[4]See also Troy, 756 F.2d at 1003 where the court noted (continued...)

supervisor's assessment of his performance, he has not disputed the findings of the trial court that they were dissatisfied with his job performance, and that was the reason for his discharge. Petitioner would thus lack the foundational evidence necessary to meet the burden of proof set out by the trial judge, and a JNOV for Carpenter would have been appropriate.

The district court's refusal to grant the petitioner a jury is, therefore, harmless error, and does not provide any of the special or important reasons that might warrant review by this Court.

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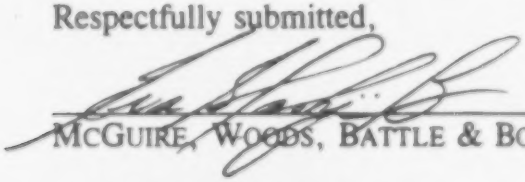
[4](...continued)
that: "[i]f only one reasonable verdict was possible from the evidence, harmless error would have strong appeal . . . ." The Troy court also found that "in close cases the losing parties' right to appellate review can be prejudiced where there is a general jury verdict and the appellant was entitled to the benefit of the separate findings and conclusions provided by Rule 52." Id. However, this was not a close case and the plaintiff did receive the benefit of separate findings of fact and conclusions of law provided by Federal Rule 52.

CONCLUSION

For the above reasons, Carpenter requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify under penalty of perjury that, on February 18, 1994, pursuant to Counsel for Respondent's instructions, I mailed FORTY (40) copies of the above Respondent's Brief in Opposition to the Clerk's office of the Supreme Court of the United States, and THREE (3) copies to Counsel of Record for Petitioner:

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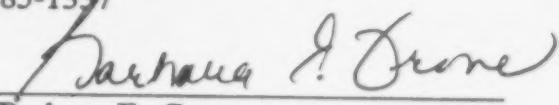

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